

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:
VITAMINS ANTITRUST LITIGATION

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) Misc. No. 99-197 (TFH)
) MDL No. 1285

THIS DOCUMENT RELATES TO:
Animal Science Products, Inc., et al. v.
Chinook Group, Ltd., et al.

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FILED

JUL 25 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION Re: UCB Settlement

Pending before the Court is Class Plaintiffs' Motion for Preliminary Approval of Settlement Between Class Plaintiffs and Defendant UCB Chemicals Corporation and For Certification of Settlement Class. Upon careful consideration of Class Plaintiffs' Motion, the representations made at the July 24, 2001 status conference, and the entire record herein,¹ the Court will grant Class Plaintiffs' Motion for Preliminary Approval of Settlement Between Class Plaintiffs and Defendant UCB Chemicals Corporation and For Certification of Settlement Class.

I. BACKGROUND

Pursuant to the instant Settlement Agreement, UCB Chemicals Corporation – which did not sell choline chloride in the United States and therefore had no share of the United States market for choline chloride – will make a cash payment of \$9,000,000 to be available to the members of the UCB Settlement Class. The proposed UCB Settlement Class consists of all persons or entities who directly purchased Vitamin B4, also known as choline chloride, in the United States or for delivery in the United States from any of the Defendants or their co-conspirators from January 1, 1988 through December 31, 1998. Excluded from the proposed

¹No objections were filed to Class Plaintiffs' Motion, nor were any objections raised at the July 24, 2001 status conference.

Settlement Class are all governmental entities, defendants, their co-conspirators, and their respective subsidiaries and affiliates.

The Settlement Agreement also obligates UCB Chemicals Corporation to cooperate with Class Plaintiffs in their ongoing prosecution of this litigation against the remaining Defendants. In exchange, the UCB Settlement Class will dismiss all claims against UCB Chemicals Corporation and a group of "Releasees" that is defined in the Settlement Agreement. The UCB Settlement Class members will not relinquish their rights to participate in class actions based on their indirect purchases of Vitamins Products, including choline chloride.

This Settlement is quite similar to the previous choline chloride settlements in this litigation.² However, unlike the prior choline chloride settlements, this Settlement Agreement has a Most Favored Nations Clause, which provides that the "UCB Settlement Class members will not settle their claims relating to choline chloride against any Defendant that manufactured, distributed, or sold choline chloride, or that had an ownership interest of more than 25% in a Defendant that manufactured, distributed, or sold choline chloride, for less than the amount to be paid by UCB Chemicals into the Settlement Fund pursuant to Paragraph 7 hereof, unless Class Plaintiffs' Co-Lead Counsel has reasonably concluded that continued litigation against a Defendant in order to obtain a judgment or settlement in an amount equal to or greater than the amount to be paid by UCB Chemicals into the Settlement Fund pursuant to Paragraph 7 hereof, is unreasonable given the risk of litigation and/or collection." Settlement ¶ 17. This Most Favored Nations clause appears to be somewhat unusual in that, unlike the Most Favored Nations

²On March 31, 2000, the Court granted final approval to Class Plaintiffs' first settlement regarding choline chloride with BASF. The second choline chloride settlement, which received final approval on July 17, 2001, was reached with the Akzo Defendants.

clause in the bulk vitamins settlement, this Most Favored Nations clause does not have any temporal restriction.

II. DISCUSSION

In their Motion, Class Plaintiffs urge the Court to (1) certify this proposed Class and grant preliminary approval of the proposed Settlement Agreement; (2) establish a date for a hearing on final approval of the proposed Settlement; (3) approve the Notice of Class Action Settlement with UCB Chemicals Corporation and Hearing Thereon and Summary Notice of Hearing on Class Action Settlement and Hearing Thereon; (4) direct that the Notice and Summary Notice be disseminated in the manner described in the accompanying Memorandum; (5) establish deadlines for requests for exclusion and the filing of objections; and (6) order a stay of all proceedings in the class action against UCB Chemicals Corporation until the Court renders a final decision regarding the approval of this Settlement.³

A. Certification of Proposed Class

A settlement class should be certified where the four requirements of Fed. R. Civ. P. 23(a) -- numerosity, commonality, typicality, and adequacy -- are satisfied, as well as one of the three subsections of Fed. R. Civ. P. 23(b). Thomas v. Christopher, 169 F.R.D. 224, 236 (D.D.C. 1996).

With respect to the first Rule 23(a) element, although there is no magic number of

³The Settlement Agreement provides for the suspension of discovery against UCB Chemicals Corporation and also provides that Class Plaintiffs will move this Court for a formal stay of proceedings against UCB Chemicals Corporation. See Settlement ¶ 19. This provision mandating a suspension of discovery and a stay of formal proceedings against the settling Defendant is reasonable; courts routinely stay discovery pending settlement and pursuant to the parties' agreement. See, e.g., Chemical Mfs. Ass'n v. United States Environmental Protection Agency, 919 F.2d 158, 161 (D.C. Cir. 1990).

plaintiffs that will qualify for class certification, courts have generally found groups of more than fifty to satisfy the numerosity requirement. See, e.g., Committee of Blind Vendors v. District of Columbia, 695 F. Supp. 1234, 1242-43 (D.D.C. 1998) (63 class members), rev'd on other grounds, 28 F.3d 130 (D.C. Cir. 1990). In this case, the proposed Settlement Class numbers at least in the hundreds and possibly the thousands. This Settlement Class is not so large as to pose manageability problems, and therefore fits well within the numerical range of other classes that have been certified by this and other courts. See, e.g., In re Newbridge Networks Sec. Litig., 926 F. Supp. 1163, 1175-76 (D.D.C. 1996) (certifying class consisting of "thousands" of members).

The second factor which this Court must consider is the existence of questions of law or fact common to the class. A common nucleus of operative facts generally satisfies the commonality requirements of Rule 23(a)(2). In this case, it appears that all of the members of the UCB Settlement Class have at least the following issues in common: (1) whether Defendants, including UCB Chemicals Corporation, agreed to fix and raise prices for choline chloride; (2) whether Defendants, including UCB Chemicals Corporation, agreed to allocate customers or the volume of sales and market shares for such products; (3) whether Defendants, including UCB Chemicals Corporation, agreed to rig bids for contracts to supply choline chloride to customers in the United States and elsewhere; and (4) whether Defendants, including UCB Chemicals Corporation, participated in meetings and conversations to monitor and enforce adherence to the agreed-upon prices and market shares. Therefore, the Court is satisfied that common questions of fact and law predominate in this case.

Third, the Court must determine whether "the claims . . . of the respective parties [are] typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). A plaintiff's claim is typical "if it arises from the same event or practice or course of conduct that gives rise to a claim of another

class member's where his or her claims are based on the same legal theory." Stewart v. Rubin, 948 F. Supp. 1077, 1088 (D.D.C. 1996), aff'd, 124 F.3d 1309 (D.C. Cir. 1997). Typical does not mean "identical," however; the typicality requirement has been liberally construed by courts. See Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 185 (N.D. Ill. 1992); In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524, 532 (M.D. Fla. 1996). Generally, "typicality in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violations by defendants." In re Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 241 (E.D.N.Y. 1998). In this case, Class Plaintiffs allege practices or common courses of conduct by Defendants, including UCB Chemicals Corporation, directed against all UCB Settlement Class members from January 1, 1988 through December 31, 1998. Class Plaintiffs also allege the same theories of antitrust liability as all Settlement Class members. Accordingly, the Court is satisfied that the claims of the Class representatives in this case are typical of the proposed Class.

The final requirement of Fed. R. Civ. P. 23(a) is that the representative parties must fairly and adequately represent the class. Fed. R. Civ. P. 23(a)(4). This Circuit has held that to establish adequacy, "(1) the named representatives must not have antagonistic or conflicting interests with unnamed members of the class, and (2) the representatives must appear to be able to vigorously prosecute the interests of the class through qualified counsel." National Ass'n of Reg'l Med. Programs v. Mathews, 551 F.2d 340, 345 (D.C. Cir. 1976). In this case, there is no indication that the named Plaintiffs have any conflicting interests with other members of the UCB Settlement Class. To the contrary, each member of the proposed Settlement Class appears to have strong and equal interests in establishing Defendants' liability. Moreover, the named Plaintiffs have collectively purchased substantial amounts of choline chloride and have incurred

through their purchases the same type of injury as that of other UCB Settlement Class members. Finally, the named Plaintiffs here are represented by well-qualified and experienced counsel who are thoroughly familiar with class and antitrust litigation. Therefore, the Court has no reason to suspect that the named Plaintiffs will not adequately represent this Settlement Class.

Finally, in order to certify a settlement class, the Court must also find that the proposed class satisfies at least one of the subsections of Fed. R. Civ. P. 23(b). Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir. 1998). In this case, the proposed Settlement Class satisfies Fed. R. Civ. P. 23(b)(3). Pursuant to that subsection, a class should be certified when the Court finds that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

The Supreme Court has observed that “predominance [of common issues] is a test readily met in certain cases . . . involving violations of antitrust laws.” Amchem Products v. Windsor, 521 U.S. 591, 625 (1997). Several courts have held that “when a defendant is alleged to have participated in a nationwide price-fixing conspiracy, impact will [be] presumed as a matter of law, and the predominance requirement of Fed. R. Civ. P. 23(b)(3) will be satisfied.” See, e.g., Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 172 (E.D. Pa. 1997). In determining whether common questions of law or fact predominate, liability issues are the primary focus. See Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc., 120 F.R.D. 642, 647 (E.D. Pa. 1988). “[I]n Section 1 Sherman Act cases, the existence vel non of conspiracy has been recognized as an overriding issue common to the plaintiff class.” Chevalier v. Baird Sav. Ass’n, 72 F.R.D. 140, 149 (E.D. Pa. 1976). Given the nature of this alleged price-fixing conspiracy, it is clear that questions of law and fact common to the members of the UCB Settlement Class

predominate over questions affecting only individual Settlement Class members' complaints.

Additionally, a class action is superior to other available methods for the fair and efficient adjudication of this controversy. In fact, a class action was held to be the superior method of adjudication under similar circumstances in Lewis v. National Football League, 146 F.R.D. 5 (D.D.C. 1992):

In this case, the conclusion that the class action is superior cannot seriously be questioned. First, there are approximately 250 plaintiffs, located nationwide, each of whom would have to conduct extensive and expensive discovery in order to demonstrate anti-trust liability. Second, 250 separate trials would certainly be a waste of judicial resources. Moreover, as there is a great risk of inconsistent adjudications if these trials were pursued across the country, a trial in only one forum is justified. And there is no indication that this class action would be unmanageable or would present any unusual difficulties for the court. In light of these considerations, the court finds that the class action is the superior method of adjudicating plaintiffs' claims.

Lewis, 146 F.R.D. at 5.

Accordingly, because this proposed Settlement Class satisfies all of the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3), the Court will certify the UCB Settlement Class at this time.

B. Preliminary Approval

The Court should grant preliminary approval of a class action settlement "if the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval. . . ." See Manual for Complex Litigation, Third, §30.41 (West 1999); In re Shell Oil Refinery, 155 F.R.D. 552, 555 (E.D. La 1993) ("finding that, at the preliminary approval stage, the Court's only task is to determine whether "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does

not improperly grant preliminary preferential treatment to class representatives or segments of the class, and falls within the range of possible [judicial] approval.”). Preliminary approval of a proposed settlement to a class action lies within the sound discretion of the Court. Id.; see also In re Southern Ohio Correctional Facility, 173 F.R.D. 205, 211 (S.D. Ohio 1997) (the district court bases its preliminary approval “upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement”).

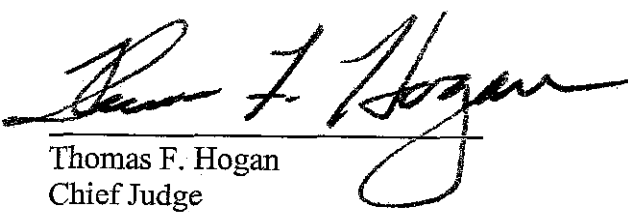
In this case, there is no reason to believe that the Settlement was the product of collusion; in fact, it appears to the Court that the proposed Settlement is based on arms’ length negotiations by experienced counsel. Moreover, after reviewing the substance of the Settlement Agreement and comparing it to the two previous choline chloride settlements in this case and in light of the entire record herein, the Court finds that the instant Settlement appears to be preliminarily fair, adequate, and reasonable and thus within the range of possible judicial approval.⁴ Accordingly, the Court will grant preliminary approval of the Settlement Agreement between Class Plaintiffs and UCB Chemicals Corporation.

⁴Although the Court has some concern over the absence of any temporal limitation in the Most Favored Nations Clause in this Settlement Agreement, the lack of temporal restriction may be warranted by the timing of this Settlement as compared to the bulk vitamins Settlement, which was reached at a much earlier stage in the litigation. Moreover, there is an escape provision in this Settlement Agreement that would still allow settlements for equal to or more than this Settlement amount where Plaintiffs’ Co-Counsel reasonably conclude that continued litigation against a Defendant is unreasonable given the risk of litigation and/or collection. The Court will revisit the issue of the propriety of this Most Favored Nations Clause upon final approval of the Settlement. However, the lack of temporal restriction does not render this Most Favored Nations Clause obviously deficient or unreasonable. Accordingly, despite this Court’s initial concerns, the Settlement Agreement is clearly within the range of possible judicial approval.

III. CONCLUSION

For the foregoing reasons, the Court will grant Class Plaintiffs' Motion for Preliminary Approval of Settlement Between Class Plaintiffs and Defendant UCB Chemicals Corporation and For Certification of a Settlement Class. Additionally, the Court will approve the Notice of Class Action Settlement with UCB Chemicals Corporation and Hearing Thereon and Summary Notice of Hearing on Class Action Settlement and Hearing Thereon and will direct that the Notice and Summary Notice be disseminated in the manner described in the Class Plaintiffs' Memorandum. Finally, the Court will grant Class Plaintiffs' Motion to stay all proceedings in the class action against UCB Chemicals Corporation until the Court renders a final decision regarding the approval of this Settlement. An order will accompany this Opinion.

July 25th, 2001


Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:
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ORDER Re: UCB Settlement

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

In accordance with the accompanying Memorandum Opinion, it is hereby

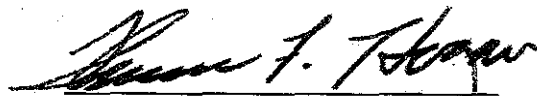
ORDERED that Class Plaintiffs' Motion for Preliminary Approval of Settlement

Between Class Plaintiffs and Defendant UCB Chemicals Corporation and For Certification of a
Settlement Class is **GRANTED**. It is further hereby

ORDERED that the Notice of Class Action Settlement with UCB Chemicals
Corporation and Hearing Thereon and Summary Notice of Hearing on Class Action Settlement
and Hearing Thereon will be issued simultaneously with this Order and will be disseminated in
the manner described in the Class Plaintiffs' Memorandum.¹ It is further hereby

ORDERED that Class Plaintiffs' Motion to stay all proceedings in the class action
against UCB Chemicals Corporation until the Court renders a final decision regarding the
approval of this Settlement is **GRANTED**.

July 25, 2001


Thomas F. Hogan
Chief Judge

¹The date for the fairness hearing as well as the deadlines for dissemination of the Notice and Summary Notice and the deadlines for exclusion requests and objections to this Settlement Agreement are included in the Order Certifying UCB Settlement Class and Preliminarily Approving Proposed Settlement, Notice of Class Action Settlement with UCB Chemicals Corporation and Hearing Thereon, and Summary Notice of Class Action Settlement with UCB Chemicals Corporation and Hearing Thereon, all of which will be issued in conjunction with this Order and accompanying Memorandum Opinion.

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